THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE
ONE ASHBURTON PLACE, ROOM 411
BOSTON, MASSACHUSETTS 02108
(617) 727-8352
(800) 462-OCPF

MICHAEL J. SULLIVAN
DIRECTOR

December 28, 1995
AO-95-44

Mr. Robert M. Schlein
70 Dane Street
Beverly, MA 01915

Re: Disclosure of funds received by ballot question committee in connection with certification of ballot question

Dear Mr. Schlein:

This letter is in response to your November 17, 1995 request for an advisory opinion.

Question: Must a ballot question committee disclose the source of funds it receives for the purpose of satisfying a liability for legal fees incurred in connection with litigation regarding whether a municipal referendum petition contained sufficient signatures?

Answer: No.

Facts: You are the treasurer of a municipal ballot question committee, the Reverse Resolution 253 Committee ("the Committee") formed in November 1994 to promote a referendum petition challenging the rezoning of certain industrial land in Beverly which would permit the use of the land for a new Stop & Shop.

The referendum petition was originally certified by the Beverly Board of Registrars to contain a sufficient number of signatures. Certain Beverly voters challenged the certification. After a hearing, the Registrars reversed their certification and ruled that the petition did not contain enough signatures.

The three persons who filed the petition appealed to the Superior Court, and the Committee undertook payment of the legal expenses incurred in connection with the appeal. After a 10-day trial, the court reversed the Registrars and the question was placed on the ballot in the general election held on November 7, 1995. The voters, however, defeated the referendum.

Legal expenses incurred in appealing the Registrars certification decision have been paid until now using funds raised by the Committee for that purpose. The funds were initially deposited into the Committee's account and disbursed using the Committee's checks. All contributions and

expenditures relating to the Committee's payment of counsel were reported as part of the Committee's filing eight days prior to the election. The Committee has disclosed payments of at least $20,556 to the law firm which handled the appeal on the certification issue, but has also reported an outstanding liability of $21,359.90 to that firm.

In November and December 1994 the Committee made expenditures to obtain signatures needed to certify the question. Between December 12, 1994 (when the signatures were submitted to the Registrars) and August 1995 (when the court reversed the Registrars) expenditures related solely to the litigation. Persons who contributed to the Committee between December and August were told that their contributions would be used solely to contest the certification decision.

The parties opposing the Committee in the litigation included two individuals who originally contested the Registrar's certification of the question. These individuals ("the pro-Stop & Shop group"), were represented by counsel paid by Stop & Shop. They decided that they were not required to form a political committee for the purpose of raising their legal fees from Stop & Shop. They also decided that they did not need to disclose their contributions or expenditures on the grounds that there was no ballot question until the Superior Court ruled that the petition contained sufficient signatures.

You do not dispute the position taken by the pro-Stop & Shop Group. You contend that the remaining indebtedness for legal fees may be paid directly by the individuals in the Committee, using funds they may raise privately, and that such payment should not have to be disclosed. You argue that since the pro-Stop & Shop Group may raise funds to pay legal expenses relating to the certification litigation without disclosing the source of such funds, it would not be fair to require the Committee to disclose the source of funds raised for that same purpose. To require disclosure, even where the obligation was incurred prior to the decision by the Superior Court, would "penalize [the individuals who sought to reverse the Registrars] for erring on the side of disclosure." The Committee has paid all campaign-related expenses, and you have indicated that the Committee will dissolve if the legal indebtedness may be paid directly by individuals.

Discussion: The campaign finance law requires disclosure of all expenditures made "for the purpose of favoring or opposing" a ballot question. See M.G.L. c. 55, sections 1 and 18. Expenditures to challenge the certification of a ballot question, however, are made to enforce legal rights, not to influence the vote on a ballot question. See AO-93-36 (city could make expenditure to challenge the attorney general's certification of question).

In connection with statewide ballot questions, this office has stated that "if an organization raises funds and makes expenditures prior to certification for the limited purpose of arguing against certification or to challenge the Attorney General's certification of a ballot question, the organization would not be required to register as a ballot question committee and would not have to report its receipts and expenditures." See IB-90-02. Similarly, where a group of persons make expenditures for the limited purpose of challenging a Board of Registrars' certification decision, such activity does not require the group to organize a ballot question committee or report contributions and expenditures.

The fact that a ballot question committee was previously formed would not, by itself, require the payment of the litigation

expenses by a committee which has reported a liability for the expenses. This office has recognized that ballot question campaigns raise unique issues, not applicable in other contexts, regarding when contributions and expenditures become subject to the provisions of the campaign finance law (e.g., legal expenditures to contest the certification of a ballot question are not made to "oppose" a ballot question). See IB-90-02. Moreover, the courts have recognized that in certain limited instances contributions to ballot question campaigns should be treated differently than contributions to candidate campaigns. See Associated Industries of Massachusetts v. Attorney General, 418 Mass. 279, 285 (1994) (discussing cases which recognize that the appearance of corruption is not as likely to be present in ballot question campaigns).[1]

Given the facts in your letter, the liability was incurred specifically to contest certification, rather than to influence the outcome of a ballot question. The Committee chose to report the debt as a liability even though such disclosure was not required by the campaign finance law. Contributions and expenditures made to contest certification are not necessarily within the scope of the campaign finance law, and a liability for that purpose did not need to be disclosed in the first instance.

The Committee is not required to include the liability on its year-end report (which must be filed with the City Clerk on or before January 22, 1996). If the erroneously reported liability is not included in the report, however, an affidavit should be filed with the report, stating the reason for deleting the liability, i.e., that the liability was incurred solely to contest the Registrar's certification and was included in the previously filed report in error.

This opinion has been rendered solely on the basis of representations made in your letter and conversations with this office's staff and solely in the context of M.G.L. c. 55.

Please do not hesitate to contact this office should you have additional questions about this or any other campaign finance matter.

Sincerely,

Michael J. Sullivan
Director

MJS/cp
cc: Connie Perron, City Clerk

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[1] This opinion is limited to the specific facts stated in your letter. Compare AO-94-42 (a candidate who incurred costs in connection with a recount petition after an election could not establish a fund separate from his political committee to accept funds given to pay for legal costs associated with the recount since funds given for this purpose are "contributions") and AO-93-23 (a candidate's committee which failed to report a 10-year-old loan from candidate could amend previously filed reports only if existence of loan could be established by reference to documents created at time of loan).